

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

75-7053

United States Court of Appeals
FOR THE SECOND CIRCUIT

WILLIAM GARAFOLA,
Plaintiff-Appellee,
—against—

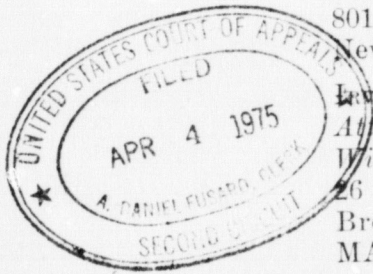
F. A. DETJEN, "SAAR",
Defendant and Third Party Plaintiff,
—against—

PITTSTON STEVEDORING CORP.,
Third Party Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO APPELLANT'S BRIEF

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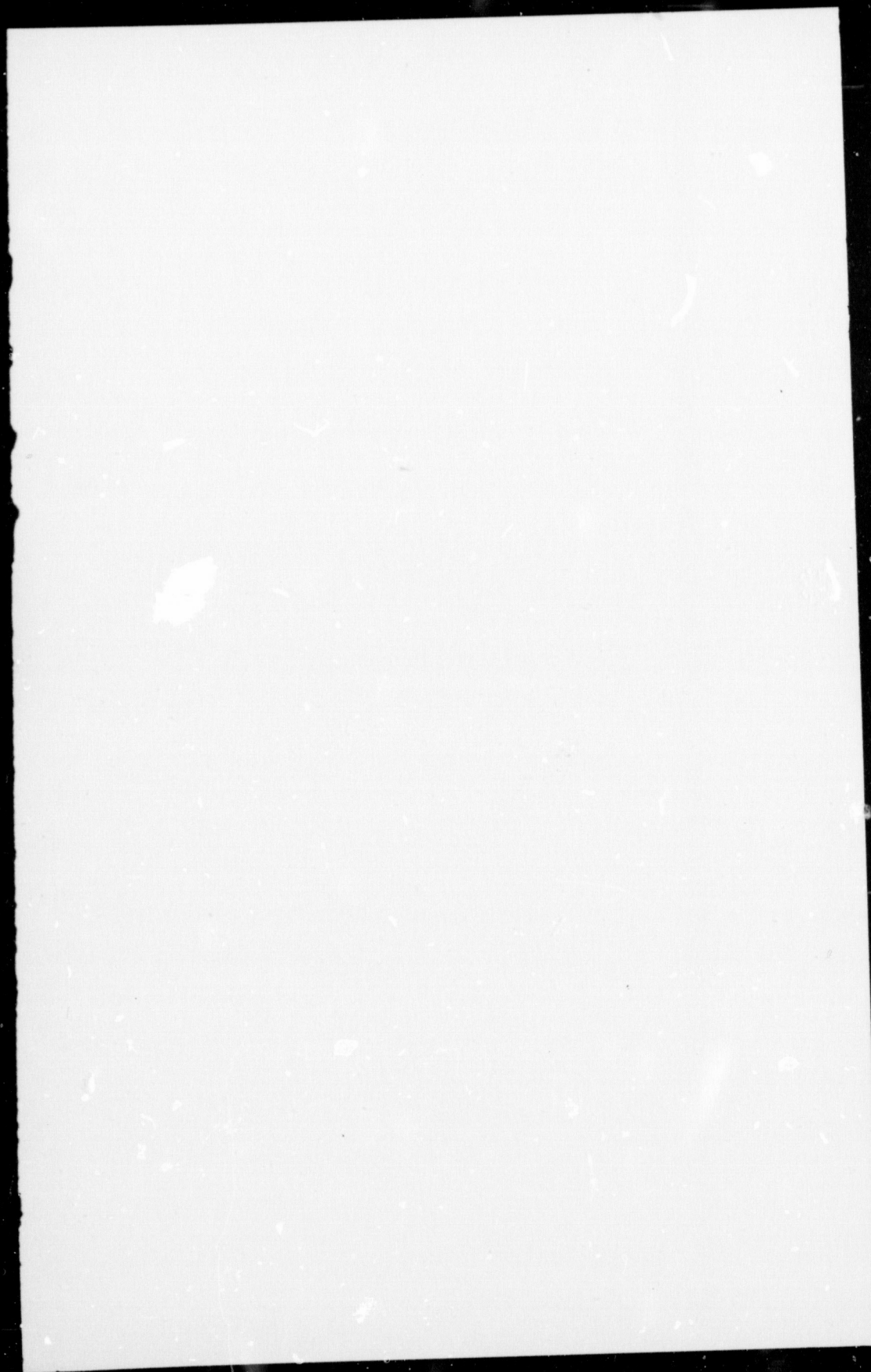
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United States Court of Appeals

FOR THE SECOND CIRCUIT

71 Civil 658

WILLIAM GARAFOLA,

Plaintiff-Appellee,

—against—

F. A. DETJEN, "SAAR",

Defendant and Third Party Plaintiff,

—against—

PITTSTON STEVEDORING CORP.,

Third Party Defendant-Appellant.

Docket Entries

DATE	FILINGS—PROCEEDINGS
6- 1-71	Complaint Filed. Summons Issued.
6-29-71	Summons returned and filed. NOT served.
7-21-72	Supplemental summons issued.
7-21-72	Supplemental summons and complaint mailed to F.A. Detjen, Kajen, 6-8,2 Hamburg 11, Germany
12-28-72	Notice of appearance of deft filed.
1-15-73	Answer to amended complaint filed.

Docket Entries

DATE	FILINGS—PROCEEDINGS
1-15-73	Third-party complaint filed Third-party summons issued
1-15-73	Deft's interrogatories to third-party deft filed.
1-15-73	Deft's interrogatories to pltff filed.
1-24-73	Notice of taking deposition of Pittston Stevedoring Corp ret 4-25-73 at 120 Broadway, NYC filed.
1-24-73	Notice of taking deposition of William Garafola re. 28-73 at 120 Broadway, NYC filed.
2- 2-73	3rd Party Summons returned and filed—executed
2-27-73	Answer of third-party deft Filed.
2-27-73	Third-party deft's Interrogatories to third-party pltff filed.
3-12-73	Notice to take deposition of pltff & deft by 3rd-party deft filed.
3-30-73	Notice to take deposition of pltff & 3rd-party pltff filed.
4-12-73	Before Bruchhausen, J.—Case called for p/t conf.—Adjd. to 10/1/73
7-12-73	Pltff's answers to interrogatories filed.

Docket Entries

DATE	FILINGS—PROCEEDINGS
7-13-73	Notice of motion to amend the Ad Damnum clause of complaint filed.
10- 1-73	Before BRUCHHAUSEN, J.—Case called for pre trial conference. Adj'd to 11-15-73 for trial.
12- 4-73	Before BRUCHHAUSEN, J.—Case called—Trial commenced—Jury impanelled—Cont'd to 12/5/73
12- 5-73	Before BRUCHHAUSEN, J.—Case called. Trial resumed. Con't to 12-6-73
12- 6-73	Before BRUCHHAUSEN, J.—Case called—Adj'd to 12/7/73
12- 7-73	Before BRUCHHAUSEN, J.—Case called. Trial resumed. Counsel summed up. Jury charged.—Jury returned and rendered a verdict in favor of the plaintiff in the sum of \$235,000.00. Third-party pl'tff entitled to judgment over against third-party de'ft.
12-10-73	JUDGMENT ON JURY VERDICT FILED, dtd 12-7-73. Pl'tff to recover \$235,000 with costs. Third party pl'tff entitled to judgment over
1- 4-74	Notice of appeal filed. Duplicate mailed to C of A and attys. jn
1- 7-74	Stenographer's transcript dtd 12-4-73 filed.
1- 7-74	Stenographer's transcript dtd 12-6-73 filed.

Docket Entries

DATE	FILINGS—PROCEEDINGS
1- 7-74	Stenographer's transcript dtd 12-7-73 filed.
1- 8-74	Bond undertaking for costs on appeal filed.
1- 9-74	Bill of costs filed. Costs taxed against F.A. Detjen in the amount of \$344.36.
1-17-74	\$260,887.88 bond on appeal filed.
1-17-74	Deft's notice of protective cross-appeal filed. Duplicates mailed to C of A and attys. jn
2-11-74	Above record on appeal certified and handed to R. W. Johnson for delivery to the C of A.
2-14-74	Acknowledgment received from C of A for receipt of record on appeal & filed.
3-25-74	Certified copy of judgment received from C of A dismissing appeal of Pittston Stevedoring Corp filed. jn
12-13-74	By BRUCHHAUSEN, J.—Final judgment filed. Ordered that the final judgment dtd 12-7-73 be vacated & plttf W Garafola recover from deft F A Detjen, etc the sum of \$235,000 with costs in the sum of \$244.36, etc. (p/c mailed to attys)
1-10-75	Notice of Appeal filed. Copy sent to C of A. JN.
1-23-75	Notice of Protective cross-appeal by deft and third party plttf filed. Copy sent to C of A. JN

Excerpts From Trial Testimony

[4] * * *

Mr. Bushlow: One more thing, your Honor. It is hereby stipulated by and between all the parties that the medical expenses in this matter are in the sum of \$16,000.

The Court: Very well.

Mr. Stanziale: So stipulated.

* * * * *

[6] Q. Are you the plaintiff in this action, Mr. Garafola?
A. Yes, sir.

Q. What is your occupation? A. Longshoreman.

Q. How long have you been a longshoreman, Mr. Garafola? A. About 17½ years.

Q. Mr. Garafola, at the time of this accident, when this accident happened, were you working on a ship? A. Yes, sir, in the hold of the ship.

Q. Do you remember the day of the week that was?
A. December 20, 1969.

Q. What day of the week was it? A. Saturday.

* * * * *

[7] * * *

Q. Before this day, Mr. Garafola, on say Friday, Thursday, Tuesday and Wednesday, what kind of work did you do on the pier? A. I am an extra labor man. I belong in the steady extra labor.

Q. What is extra labor? A. I work for Pittston but as extra labor on trucks.

Q. Is that done on the pier or on the vessel? A. On the pier. We take cargo out and put it in.

Q. On December 20, 1969, who was your employer? A. Pittston Stevedoring Company.

* * * * *

Garafola—Direct

[9] * * *

Q. When you got on the ship about what time was it?
A. About 8:30.

Q. Were you loading? A. Loading empty cargo.

Q. In the morning, what was it? A. Heavy drums, about 900 pounds each. Two at a time.

Q. Did you do that until 12 o'clock? A. Yes. That was filled into the wings.

Q. Where did you go at 12 o'clock? A. To eat.

Q. What time did you get back? A. One o'clock, quarter to one.

Q. When you got back, where did you go? A. Back to No. 2 hatch.

Q. Were you still loading or— A. Loading containers and pallets.

Q. Were these containers full of cargo or empty? A. Empty.

Q. Mr. Garafola, did you have an accident that day?
A. Yes, I did.

Q. About what time of the day did that accident happen?
[10] A. 4:15, 4:20 in the afternoon.

Q. Just before this accident, Mr. Garafola, I ask you to look at these containers and pallets as we have them here (indicating).

Can you state whether or not this represents the condition at the time immediately before you had your accident?
A. Yes, just like that.

Q. Would you please—with His Honor's permission—come down and show the jury where you were standing just before the accident.

The Court: Yes.

A. Me and Rocco—

Garafola—Direct

Q. Where were you standing? A. At the end of the platform.

Q. How much space was there between the wall of the container and this container, approximately? A. Foot and a half to about a foot.

* * * * *

[12] * * *

Q. Did you get an order? A. Yes, to come up.

Q. Who gave you that order? A. The gangway man.

Q. Was the hatch boss there that day? A. No.

Q. What was his name? A. Robbie.

Q. Do you know who was in charge of the gang that day?

A. I know his face, not his name.

Q. Where was he standing? A. On the corner, looking down.

Q. He gave you an order to do what? A. Come up.

Q. What did you say? A. Give me a ladder. There is a big hole here. You need at least a 20-foot ladder to put that in the space left open, seven by seven feet.

* * * * *

[13] Q. Did any ladder come down? A. No.

Q. Did anybody else within your hearing ask for a ladder? A. Yes, Rocco asked for a ladder.

Q. Who is Rocco? A. The other fellow with me, standing up on the—

Q. What response did you get when you asked for a ladder? A. They said come on up. We only got another half hour, come on up.

Q. What did you start to do? A. I walked where the pallets were and started walking up.

Q. Tell us just— A. I stepped on something and slipped and I lost my balance and I went right in that hole in the center.

Garafola—Direct

Q. How far would you say you fell? A. About 13 feet.

Q. When you fell, do you know what parts of your body you injured? A. Sure. My leg hit some of the pallets on the edge of the container about here (indicating). I broke my leg very bad.

Then my back, elbow, not my head but my brain shook so [14] much that I got noises in my ear day and night.

* * * * *

[17] Q. Did they operate on you? A. They must have, that afternoon.

Q. How long did you stay in the hospital? A. Nearly five months.

Q. When did you get out? A. I think May 7th, the 9th.

Q. While in the hospital, did the doctors visit you? A. Sure, every day.

Q. Did you have an operation? A. I had three operations and one skin graft.

Q. Did they put anything on your leg? A. Yes. I had a cast up to my hip.

Q. How long did you have to stay in bed? A. I had to stay still for three and a half months.

Q. You didn't get out of bed at all? A. No. They put a pan underneath and something else to pass your urine, a bag.

Q. When finally after three and a half months were you able to get out of bed? A. It was about four months before I got out of bed. They put me in a wheelchair.

Q. And wheeled you around in a chair? A. Yes.

Q. When you left the hospital, Mr. Garafola, how did you leave the hospital? [18] A. On crutches and a wheelchair. They brought me out in a wheelchair.

Q. Where did you go? A. A son of mine's house in Staten Island.

Garafola—Direct

Q. Were you able to get around? A. I was on a wheelchair and with two crutches. When I got tired I sat in the wheelchair.

Q. Mr. Garafola, how long after you got out of the hospital did you have to use the wheelchair? A. All together about seven or eight months.

Q. After the hospital? A. Yes.

Q. Did you also use crutches, Mr. Garafola? A. Yes.

Q. One or two? A. Two crutches.

Q. How long, Mr. Garafola, after you left the wheelchair did you have to use the two crutches? A. Well, the two crutches, about a year after that; and another year and a half with one crutch.

Q. Mr. Garafola, did you leave your son's house? A. Yes.

Q. You went to live by yourself? A. No, I went to live with another son. He wanted me for [19] a couple of months.

Q. After that? A. A brother of mine. My brother in Long Island. I went to live with him two or three months.

Q. Then, Mr. Garafola, did you move back into Brooklyn again? A. Yes. The Hotel St. George, for about four or five months.

Q. While in the Hotel St. George, how did you get around? A. Two crutches.

Q. When you left the Hotel St. George, where did you live? A. In the Pierrepont Hotel. About a year and a half to two years. A year and a half was the least.

Q. When you lived in the Pierrepont Hotel how did you get around? A. With the crutches.

Q. Did you have two or one? A. At the time, two crutches. For another seven or eight months.

Q. Did there come a time when you only used one

Garafola—Direct

crutch? A. Yes, a couple of times I tried to walk out with no [20] crutches. I walked maybe half a block and had to go back and get the crutch because it hurt.

Q. During all this time, Mr. Garafola, were you going back to the hospital for treatment? A. Yes, therapy treatment.

Q. Mr. Garafola, did there come a time, sir, when you got along without any crutches at all? A. Then I had to use the cane.

Q. Did you ever try to walk without that cane? A. No, I would never leave it. It hurts.

Q. Did you try to walk without it? A. Maybe in the house, ten or fifteen steps. That's all right.

Q. Mr. Garafola, what bothers you now? Which leg was that that was operated on? A. My right leg. I got noise in my ear.

Q. What bothers you today about your right leg? A. What?

Q. Do you have any pain? A. Pain every day, all the time.

Q. What about your shoulder and your right elbow. A. Yes.

Q. What about that, how does that feel? A. I can't straighten it out. (Indicating.) I can't button [21] my shirts, it hurts all the time.

Q. What else bothers you? A. My neck. I turn my head all the time.

Q. What else? A. Part of my shoulders, the neck down to the shoulder.

Q. Did you say something about a buzzing in your ear? A. Day and night.

* * * * *

Garafola—Cross

Q. Mr. Garafola, from the day of this accident, December 20, 1969, until the present date, have you returned to work? A. No, I can't work. I was on disability.

Q. Mr. Garafola, prior to this accident, the year before this accident, were you working as a longshoreman? A. Yes.

Q. How much did you make for the year before this accident? A. About 11 thousand dollars.

Q. Two years before this accident? A. About the same.

Q. Eleven thousand dollars each year? [22] A. Yes, something like that.

I worked a lot of overtime.

Mr. Bushlow: No further questions.

Cross-Examination by Mr. O'Brien:

Q. Mr. Garafola, if you can't hear me, please let me know. Will you keep your voice up so everybody can hear you? A. All right.

Q. Can you hear me? A. If you talk loud enough.

Q. In the morning you loaded some drums in the hatch? A. Yes.

Q. Then you came out and went to lunch? A. We got through I think 12 o'clock.

Q. About one o'clock you came back in the hatch? A. Yes.

Q. Now, when you came back into the hatch after lunch you went down to the lower hold of No. 2 hatch? A. Yes.

Q. How did you get down? A. They got the ladder that is riveted onto the ship.

Q. Permanently installed steel ladder? [23] A. Yes, it was still open.

Garafola—Cross

Q. Those ladders were all right? A. Yes, they are steel ladders.

Q. You had no trouble going down? A. No.

Q. You got— A. There was nothing in front of them then.

Q. They were not blocked at that time? A. No.

Q. When you went down and came down, were there any containers—I take it you say the containers were in the wings? A. Yes.

Q. Were there any containers or pallets in the lower hold at that time? A. I don't remember.

Q. Well, do you remember having to climb up on top of any containers when you went down there? A. After we started loading, I don't know how many we put in.

Q. When you came down through the ship's ladder where was the ladder? A. Offshore.

Q. That was running down the side of the hatch? [24]
A. That's right.

Q. You and the other longshoremen went down that ladder? A. Yes.

Q. You went all the way down to the lower hold? A. Yes.

Q. Do you remember whether you stepped off the ladder onto some containers already there or whether you stepped right onto the deck of the lower hold? A. The deck of the hold.

Q. What happened next? A. They started bringing pallets and containers in. Sometimes two or three drafts of pallets, we still had the hi-lo's down there.

Q. Who operated that? A. The longshoremen.

Q. The hi-lo's belong to the stevedoring company? A. They were two gangs; a gang on one side and one on the other.

Garafola—Cross

Q. Both gangs were employed by Pittston? A. Yes.

Q. As yourself? A. Yes.

Q. Do you recall when the containers and pallets [25] came in, was it your acting hatch boss telling you where to put them? A. The gangway man, yes. Usually in every hold of a ship—

Q. What happened then, not usually?

You say the gangway man was acting as hatch boss? A. Yes.

Q. Do you know why that was so? A. The regular hatch boss was sick, the boss of the gang.

Q. You took your orders from the acting hatch boss? A. Yes.

Q. He was employed by Pittston? A. Yes. What they call an extra-steady gang.

Q. Can you tell me, when these containers came down and the gangway man directed where they were to be placed, were they placed side-to-side across the hatch? A. (No response.)

Q. The empty containers that came down? A. When they took the hi-lo's out, there was four men on one side and four on the other. We guided them while the winchmen drove them over.

[26] *By Mr. O'Brien:*

Q. You pushed these containers the last few inches into place, is that right? A. Yes.

Q. And the winch man places the containers down on the deck? A. Yes.

Q. What did you do, did you come up on top of the container to— A. No, other men go up on the stack of pallets and go up and they unhook it. We did that too, me and Rocko.

Garafola-Cross

Q. Did there come a time—strike that.

You testified in answer to direct examination by Mr. Bushlow, Mr. Garafola, the containers were set as they are on the table here so that there was an 18 inch ledge on top of the first tier? A. 18, 2 feet, I don't remember.

Q. Approximately 20 inches? A. Yes.

Q. And in front of that ledge was a void, an empty space? A. Yes.

Q. How high was that first tier of containers? A. 8 feet high.

[27] Q. When you were standing on the ledge you were about 8 feet above the steel deck? A. Yes.

Q. Can you tell me how high the stack of pallets was?

A. They made them the same level as the containers.

Q. As the second tier of containers? A. Yes.

Q. Another 8 feet? A. The pallets to the bottom of the ship being level with the first container, we walked on.

Q. You say there were also pallets on the deck level? A. Yes.

Q. How high did those pallets extend? A. About 8 feet, I think.

Q. They would be up about the same height as the tier of containers? A. Yes.

Q. Was there a space between that ledge and the container that was sitting on the deck? A. Yes, that was a 7 foot space. On that side we had the pallets too. Because when I fell this friend of mine pulled me against the pallets and put my head against it.

[28] Q. You say there was a 7 foot hole? A. 7 by 7. Maybe, more or less.

Q. That was the hole in which you fell? A. That is true.

Q. Tell me about how far you fell? A. About 13 feet.

Garafola-Cross

Q. About when you started to climb the pallet, how far were you from the top of the stack? A. About 10 pallets.

Q. You climbed 10 pallets? A. Yes. I slipped on something and went into the hole.

* * * * *

[30] * * *

Q. After you asked the hatch boss for the ladder, did the hatch boss send a ladder down? A. No.

Q. Was there a mate there, do you know? A. No.

* * * * *

[31] * * *

Q. After you—how many times did you ask for a ladder? A. About three or four times. Not only me, some other fellows too.

Q. How many other fellows? A. Rocko, and I heard somebody else.

Q. The first time you asked the mate for a ladder, did he say anything— A. Not the mate, the gangway man.

* * * * *

Q. The gangway man gave you an order? Did you obey that order? A. I seen no ladder coming down, I was the first one to start going towards the ladder.

Q. Towards the ladder? **[32]** A. I mean the pallets. To use them as a ladder.

* * * * *

Q. Mr. Garafola, when you received an order to come up to the next tier or next level in the hatch, was there any reason why you didn't climb the pallets at that time? A. I thought he would come back with a ladder.

* * * * *

Garafola-Cross

[33] * * *

Q. You would have preferred a ladder? A. I ask him three or four times. Me and the boy working on my side. I told him if the ship starts moving—

The Court: Don't volunteer anything.

Q. You testified earlier you came down using the ship's steel ladder fixed in place, is that correct? A. Yes.

* * * * *

Q. Who put the containers and platforms to block the ladder? A. The gang.

Q. Pittston? A. Yes.

* * * * *

Q. Did your acting hatch boss direct that the containers and pallets be put in to block the ladder? [34] A. Of course.

* * * * *

Q. No space between the containers to go to the ladder? A. No. From where we had the drums we had extra platforms up to that level and then they come down with containers and platforms.

Q. They made the ladder inaccessible to you? A. That's right. You couldn't go up or down.

Q. During the course of stevedoring operations, you don't look to the ship's officers for the ordinary every day work you do? A. I didn't get that.

Q. You didn't expect the ship's officers to give you orders? A. No.

Q. You get that from the hatch boss? A. Of course. I was on extra labor all the time. I don't work down the hold much. Maybe 15 or 20 times in 17 and a half years.

Garafola-Cross

Q. You been in the hold of a ship before? [35] A. Yes, but not many times. I was a dock man when I worked on the ship about 10 years.

Q. When you asked for a ladder was the acting hatch boss looking down over the coaming at you? A. Yes.

Q. He saw you? A. Yes.

Q. He saw you standing on the ledge? A. Yes.

Q. Do you know whether he saw you climb the pallets? A. He gave us order to come up.

Q. Did he order you to— A. He said come on up. I can't fly there.

Q. He saw the pallets there? A. Yes.

Q. Mr. Garafola, at the present time, are you able to use public transportation, buses and so on? A. Yes.

Q. You go to the store? A. Yes.

Q. What do you do with your time, generally? A. I watch TV, read the paper.

Q. You go to any bars? A. No, I don't drink.

[36] Q. You were a professional boxer at one time? A. Yes.

Q. Can you tell us some of the big names you fought? A. Harry Ebbits, Benny Leonard, Ruby Goldstein, Canada Lee.

Q. How long were you a professional prizefighter? A. Near 12 years.

Q. During that period of time you got hit in the face and head often? A. Of course.

Q. Did you get hit about the ears? A. A little bit. Eventually you get hit in the ears.

Q. You have been hit in the head and face? A. I bobbed and weaved and got less punches than some of the other fellows.

Garafola-Cross-Stanziale

Q. Were you ever knocked out? A. No, never. I slipped a few times and sometimes in the same round I knocked the guy out.

* * * * *

[38] * * *

Q. Mr. Garafola, did you think it was dangerous to climb those pallets? A. Yes.

* * * * *

[39] *Cross-Examination by Mr. Stanziale:*

Q. Mr. Garafola, when the first containers were put down in the hold of the ship in hatch number 2, where were you at that point? A. The first tier of containers? We were in shore.

Q. On the containers? A. Me and Rocco.

Q. How did you get onto this particular container as you testified on direct examination? A. Walked on the platform.

Q. You say platform, you mean pallets? A. Yes.

Q. These pallets, they were down, is that right? A. Yes.

Q. And they were just as high as these containers (indicating)? A. As one container.

Q. There may have been a pallet here as high as the container and you walked from the pallets onto this particular container? A. We walked over this side off shore, got onto the container and he brought the container. We hold onto the wires and the containers.

[40] Q. My question is, how did you get onto that container, you walked from pallets onto that container? A. Yes, that was only 7 or 8 feet.

Q. There were pallets on the hold of the ship about 7 or 8 feet up? A. Yes. That is done a lot down the dock

Garafola-Cross-Stanziale

Q. You go from one pallet onto a container? A. Yes.

Q. How many stacks of those 7 or 8 were there? A. I don't remember.

Q. How did you get on top of the first tier of pallets? A. Climbed up on them.

Q. You climbed up these pallets (indicating)? A. Yes.

Q. You were on top of the first tier and they started putting the second tier in? A. Yes.

Q. At one point you were down on the steel deck of the ship and at one point you climbed up on this (indicating)? A. Yes.

Q. Then when you attempted to climb up on the second tier of pallets is when you met with your accident? A. That's when I asked for the ladder.

[41] Q. I didn't ask you that. When you climbed to get to the second tier of the container, you climbed the pallets and that's when you fell, during that time? A. Yes.

Q. But you already climbed pallets before that day? A. Yes, but I refused to go up to the second tier.

Q. Did you ask for a ladder the first time when you were on the deck to get to the pallets? A. No. That wasn't too high.

[51] * * *

Q. Mr. Garafola, you say you are making a claim for your ear? A. Not my ear, my hearing. The noise in my head. I got it day and night.

Q. As already testified, you were a professional fighter? A. Yes.

Q. Which ear are you making a claim of loss of hearing? A. All around my head.

[52] Q. You pointed to your left ear, am I correct? A. Well, I pointed to the left, it could be over here (indicating). I had the doctor, Dr. Beck, he is the ear doctor,

Garafola-Cross-Stanziale

he put things in my ear and I heard noise here and here (indicating). But the noise in my ear don't go away.

Q. In your 12 years as a professional fighter, were you ever operated on for a cauliflower ear? A. No.

Q. Any treatment? A. I was operated on this, this is what they call a tin ear.

Q. You also fought for the National Guard, is that right? A. Yes, I was champion three times.

Q. Your professional career totalled 15 years? A. No, 11, 12 years.

Q. And three years in the National Guard? A. No. All total 11 or 12 years.

* * * * *

[54] * * *

Q. Did you ever sustain any injury to your right elbow? A. A little strain once in a while, you expect that down the docks.

Q. Did you ever make a claim for an injury to your right elbow before the accident? A. Yes.

Q. When was that? A. I think it was 1968, I am not sure.

Q. And Mr. Bushlow was your lawyer then at that time for that injury? A. Not '68, I was out 4 years, yeah, about 1968.

Q. And Mr. Bushlow was your lawyer for injuries you **[55]** sustained to your right elbow? A. I think he was, yes.

Q. And you were claiming you also injured your right elbow in this accident? A. My shoulder.

Q. I am talking about your right elbow. A. Yes.

Q. You had a prior injury to that? A. Yes, but I came back and worked the next day. It wasn't bad.

* * * * *

Garafola-Recross-Stanziale-Missud-Direct

[56] * * *

Recross-Examination by Mr. Stanziale:

Q. Mr. Garafola, when did you stop running and jogging? When you were a professional fighter? A. When I stop.

Q. When did you stop? When did your career as a professional fighter end? A. 1936.

Q. That was the last time you ran and jogged and [57] kept in shape? A. Yes.

Q. You didn't run and jog on December 20th, 1969, did you? A. No.

Q. How old were you then? A. 63. I did a lot of running on my own. What is the difference?

* * * * *

[63] * * *

Q. Did you get any orders to do anything at that time? A. Yes, to go up on top.

Q. Who gave you those orders? A. A man who I knew as a gangway man, a man responsible for the gang.

Q. When you got these orders, did you do or say anything? A. Yes, I asked, "How could I go up there?"

Q. Did you ask for anything to use to go up there? A. Naturally, a ladder.

Q. Did you hear anybody else ask for a ladder? A. Yes.

Q. Who? A. Willie Garafola.

Q. Did you get a ladder? A. No.

Q. Do you know how many times you might have asked for a ladder? A. Three or four times, something like that.

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[70] * * *

Q. Now, when you were on the ship, in the No. 2 Hold,

Missud-Cross

on December 20, 1969, you testified that you heard Mr. Garafola ask the gangway man for a ladder; is that correct? A. Yes.

Q. How many times did Mr. Garafola ask for a ladder that you heard? A. A few times, we asked for the ladder several times because we had no possibility—

Mr. Stanziale: I object to anything after "because." I move to strike.

The Court: Yes.

* * * * *

Q. Mr. Missud, did the gangway man tell you to climb the pallets? A. He indicated to us how we were to go up on the pallets. That was the only possibility we had.

Q. In other words, there was no other way to get [71] to that higher level than to climb the pallets?

Mr. Stanziale: I'm going to object to the form of the question. It's in the negative.

Mr. O'Brien: It's cross-examination.

The Court: Overruled.

A. The possibility for us was that they bring us a ladder so that we can go up on the ladder. Inasmuch as it was a short time left to work, the only possibility was to climb up on the pallets as he indicated to us.

Q. But you wanted a ladder; is that correct? A. Certainly, yes.

Q. Now, when you asked the gangway man for the ladder several times and Mr. Garafola asked several times, was the gangway man looking down into the hatch? A. He was looking at the gangway man because he was asking for a ladder because—

Barenfeld-Direct

Mr. Stanziale: I'm going to object to everything after "because."

The Court: Yes, sustained on that point.

* * * * *

[82] * * *

Q. Now, Doctor, did you examine William Garafola, I think on November 19, 1973? A. Yes.

Q. Where did you examine him? A. In my office.

Q. Doctor, would you please tell us what your examination consisted of, diagnosis and your prognosis. A. The patient naturally gave me a history of how his accident occurred.

Would you like me to go through that?

He indicated on December 20, 1969, he was **[83]** working in the hold of a ship at Pier 9-B in Brooklyn, standing on a container. He was attempting to get out of the hold, when the platform on which he was standing collapsed and he fell to the steel deck approximately thirteen feet below.

He recalled blacking out momentarily, and when he revived, he was in a considerable amount of pain, especially with respect to his right leg.

He was taken from the hold, eventually, and brought to the Long Island College Hospital in Brooklyn.

Mr. Bushlow: At this time, your Honor, I have the Long Island College Hospital records here by subpoena. May I introduce these into evidence?

Mr. Stanziale: May I see them.

(Said documents are handed to Mr. Stanziale.)

Mr. Stanziale: May it please the Court, the doctor can't continue unless he sees the records. I will look through it briefly.

Barenfeld-Direct

A. He was admitted to the hospital immediately. He indicates that bone was noticed to be protruding through the skin of his right leg.

He was prepared for surgery very quickly, and was operated upon the same day.

[84] He indicated that he remained hospitalized through May of 1970. He had a cast applied following surgery. That cast remained on for approximately a year. It was a long leg cast, which extended from the middle of the thigh to the toes.

He remained on crutches for approximately nine months. Prior to that he was in a wheelchair for approximately six or seven months.

Following the use of crutches, he used a cane and was still using a cane when I saw him in my office.

After his discharge from the hospital, he was referred for physiotherapy to the University Hospital in Brooklyn. He had approximately fifteen treatments and was then advised that no further improvement could be expected.

He indicated to me he still had considerable amount of pain and swelling in the right ankle and that there was limitation of motion of the ankle.

He also complained of symptoms related to the right elbow, which was also intermittently painful and limited in motion.

He also had occasional pain in his neck, which he complained of following the accident.

Since the accident he also indicated that **[85]** he had buzzing in his ears, especially the left ear, and that he had been examined briefly by an ear, nose, and throat specialist but he had obtained no significant relief.

Barenfeld-Direct

The patient stated that he takes pain killers frequently to relieve his pain, and that he also has to take sleeping pills to allow him to sleep at night frequently.

I also had the opportunity to review the records of the Long Island College Hospital and several physicians who had examined the patient over the course of approximately four years.

On reviewing these records, I found again the history that he had given as far as the nature of the accident: while in the emergency room at the Long Island College Hospital, he was given antibiotics to prevent infection, and tetanus antitoxin.

His right leg was splintered, and dressings were applied to the compound fracture of the lower tibia. The tibia is the main bone in the leg. This is the right tibia. Compound fracture: refers to the fact that the bone was protruding through the skin. If there is a fracture or break in the bone with the bone protruding through the skin, it's called a compound fracture.

X-rays were taken, which again revealed the fracture of the lower end of the right tibia and fibula, [86] which is the other bone in the leg, and also ossification of the Achilles tendon was noted. The Achilles tendon is the heel—you can feel it on your ankles. For some reason this heel cord had formed bone within the substance of the tendon itself. It is a rather unusual occurrence, and is not related—was not due to his accident. It apparently had been there for many, many years.

Other X-rays had been taken of the right shoulder, and they found that the patient had had a small, benign tumor in the shoulder, which again was not due to the accident. But no further fracture was noted in his shoulder.

Barenfeld-Direct

The history also noted that he had at the time of the accident limited motion of the right elbow, the same limited motion which I had found, so apparently this had preceded the accident, and the limitation of motion also was apparently not due to the accident.

I examined the patient at that time—On examination, originally, in the hospital, it was found that a large segment of skin had been evulsed, or pulled off. A large piece of skin was missing. This was the area through which the bone was protruding.

The patient was also found to have a hernia, inguinal hernia, a hernia in the right groin, which apparently was also not due to the accident.

[87] He was also found to have a cauliflower ear, which was a result of an old boxing occupation that he had as a young man.

He also had considerable tenderness and limitation of motion of the right shoulder. That was on examination medically after his accident.

He was admitted to the hospital and open reduction was performed. This means an operation was carried out in which the fracture site was opened up, incision was made; the bone—an attempt was made to reduce the fracture or place the fragments together, and two screws, regular screws, made of a particular type of metal, were placed in the fracture or across the fracture to hold the bony fragments together.

It was impossible to close the incision because a considerable amount of skin had been evulsed—pulled off. What they did was to make a relaxing incision.

A second incision is made, usually in the back of the leg. This sort of relaxes the skin and allows you to pull the skin

Barenfeld-Direct

forward over the gap. This, of course, would then—sometimes leave a bit of a gap in the back. In the front you want to have relatively normal skin. The gap that is left in the back is then covered with a skin [88] graft. This graft—they did take a skin graft from his thigh. They take skin from the thigh and apply it to that area of the relaxing incision.

Following the operation, the patient was unable to urinate. They had to place a catheter, a tube, into his bladder.

The patient then had subsequent x-rays taken, and the x-rays taken following the operation revealed that the fracture had slipped. In other words, the original position that had been obtained at the time of surgery, after the screws were put in, was no longer present. It had slipped. The fragments, because of the nature of the fracture, what we call an unstable fracture—there are many fragments—is difficult to maintain or hold in position, so that the bony fragments had slipped out of place.

They attempted to perform another closed reduction. They put him to sleep, attempted to manipulate the fragments again to try to get back the original position, but they were unable to do so. In fact, there was a note indicating that some of the healing process that had already occurred was disturbed by the manipulation.

As of April 19, 1970, the skin was still not healed. At that time they had decided to perform [89] another operation to attempt to replace the fragments into a better position.

On April 20th it was noted that the donor site, in other words, the thigh, from where the skin had been taken, was not healed. The area where they had taken the skin was also unhealed.

Barenfeld-Direct

At that time, on April 20, the cast was removed in the hospital.

On April 22, x-rays were taken again, and still the fracture was not healed properly. It was decided to cancel the surgery which had previously been planned, probably because of the nature of the skin. You cannot operate through bad skin. If the skin is unhealed or infected, then it is very risky to operate through that kind of wound. They decided not to.

A new cast was applied. This time a short leg cast, a cast that extends from just below the knee to the toes, previously it had extended from the thigh to the toes—it was decided to attempt to mobilize, or obtain better motion in his ankle.

He was referred to the physiotherapy department at Down State University Hospital. He was started on crutch walking and exercises were instituted to attempt to restore the motion in his ankle.

[90] There was a note at that time that the patient had been complaining of buzzing in his left ear, that he had indicated that this had been present since the time of his accident. The patient then had an audiometer test, a test to determine the acuteness of his hearing. It was found that he had some hearing loss in both ears.

The patient was discharged from the hospital on May 9th, 1970, and at the time he was discharged the hospital diagnoses were as follows:

Compound fracture of the distal right tibia and fibula, evulsion of skin of the right distal fibula, contusion of the right shoulder, postoperative—after the operation—urinary retention with benign prostatic hypertrophy. That means his prostate was somewhat enlarged.

Barenfeld-Direct

Tinnitus of the left ear, which means buzzing of the left ear.

The patient at that time was under the care of a doctor Thomas Weiss. He was throughout the course of this treatment up to that point. He was subsequently seen by a consultant, Dr. Joseph Silver, who indicated in his report that the patient's ankle injury was quite severe and that he might eventually require an ankle **[91]** fusion, an operation in which a fusion—a fusion is an operation in which a joint is stiffened, made stiff—so that no motion is possible. The reason that procedure is done is to eliminate pain.

Following an injury to a joint, especially a fracture within a joint, the surfaces of the joint are made irregular, the joint surfaces have to be smooth in order to get normal motion, normal, painless motion. If the joint surfaces are irregular, then the mechanics of the joint are abnormal. It's like the gears of a machine. If there are stones or the gears are irregular, the machine can't function. The same thing with a joint.

What happens when the surfaces are irregular, the individual develops what we call a traumatic arthritis. It means an arthritis of a joint due to an injury.

This produces pain and it produces progressive destruction of the joint. When this happens, the pain is severe. Motion is very, very limited, to begin with, so when you do the fusion you're losing very little motion, because there isn't very much to begin with, but what you do is limit the pain the patient has.

It was his feeling that this might be eventually necessary.

He had further x-rays throughout the course **[92]** of his treatment, and these eventually revealed that the fracture had healed, but that there was a progressive post-traumatic

Barenfeld-Direct

arthritis, which is what I just described to you, of the ankle joint.

That basically is the information that I received from the patient and from his records that he had previously.

Then I performed an examination which mainly was restricted to his ankle, which was the most symptomatic area.

At that time I noticed he was in no acute distress, but that he had a marked right sided limp and was using a cane.

When I examined his extremities, I found there was a healed scar over the anterior or front—anterior aspect of the right thigh, which represented the healed donor site. In other words, that's where the skin had been taken from for the skin graft.

There was also a 4½-inch scar, which was probably due to the operative incision, on the—anterior medial, which is the front and inner side of his right ankle, and lower leg. This apparently was due to the operative incision that had been made and possibly partly due to the skin which had been evulsed.

[93] There was a considerable deformity noted over the end of his right tibia and fibula, the lower ends of his right tibia and fibula. He had only a few degrees of motion of the right ankle in any direction.

I say "ankle," he had only a few degrees in the subtalar joint. That is the joint that allows the foot to move up and down. The subtalar joint is another joint, a couple of inches below the ankle joint, which allows the foot to turn in and out.

Both of those motions were markedly restricted. Both of those joints were affected.

There was also tenderness when I pressed on the lower end of his tibia and fibula.

Barenfeld-Direct

I measured his extremities and I found that the left thigh measured $14\frac{3}{4}$ inches in circumference, and the right thigh fourteen—No, I'm sorry. Both thighs measured $14\frac{3}{4}$ inches in circumference. In other words, they were equal in measurement.

The right calf, however, measured $12\frac{1}{2}$ inches in circumference and the left calf inches in circumference. Now, this is an inch and half difference. That represented what is known as atrophy, wasting of the muscles, which will occur following an injury and also following the application of a cast. Lack of use of an extremity [94] causes wasting of the muscles. There was an inch and a half difference.

There was a normal range of motion of both his hips and knees, both sides.

I did an examination of his right elbow as well, but I don't know if that's pertinent here.

Then I took x-rays, x-rays of the ankle, what were called A.P. and lateral views. Those are views, films taken from the front and from the sides, so we see the ankle from two different directions.

On those x-rays, we are able to see what we call a mal—badly—mal united fracture. That "mal" means—mal union means the bone did not heal properly, crooked or deformed in some way.

Q. Have you those x-rays with you? A. Yes, I do.

Q. Would you please show the jury the x-rays now, and then continue. A. All right.

The Court: Can all the jurors see?

(Said x-rays are shown on x-ray viewer to the jury.)

The Witness: This is called an A.P. view, view looking from the front.

Barenfela-Direct

[95] This is a lateral view, looking from the back.

The thing you might see that is very obvious, these two metal bodies in here, which are two screws, that were put in originally, you see them here and here.

There are several other things quite obvious. This larger bone is the tibia, and the smaller bone is the fibula. I think you can see fairly easily where the fibula was broken in two places, here and here (indicating).

You see this piece in the middle is tilted. It should be perfectly straight. The bone here and here, the bone is healed across, but this fragment, what we call a segmental fragment, has been tilted and is out of position.

Now, this is the least of the problem. The main problem is in the tibia and in the ankle joint.

Just in passing, let me say this large structure here (indicating) which you see, is the bony body that formed in the Achilles tendon. This is very large. Sometimes we will see calcification. This is a large one, again **[96]** not due to the injury.

The lower end of the tibia, which is this larger bone, which on this lateral view you see here (indicating), now, if I had a normal x-ray you would be able to see the difference much more easily, but this tibia is markedly deformed. This space that you see here (indicating) is the ankle joint. That space is much narrower than it should be. There should be a much wider space. When we see a narrow space, this is usually the result of some kind of an arthritis, and this is the traumatic, post traumatic arthritis which I mentioned before.

Barenfeld-Direct

Also, this fragment of the tibia which protrudes way down here—you see, it extends much lower in the back than it does in the front by maybe three-quarters of an inch. They should be just about on the same level; so this fragment—it's hard to see it now because the intervening portion has healed—has been pushed way down.

Also, there is what we call, in simple terms, a spur which has formed on the front of [97] this bone (indicating) which is the bone called the talus. That is the other bone that makes up the ankle joint.

The ankle joint is made up of the tibia, the bone in the leg, and the talus, which is the bone in the foot that fits into the tibia.

Now, this spur has formed. I'm sure it's as a result of injury and what it does, you see, when he attempts to bring his foot up, this hits against here (indicating), and then—so that the foot cannot come up at all. That prevents what we call extension of the foot.

The deformity that has developed in the ankle joint, the loss of the joint space and deformity of the two bony surfaces that have to be perfectly formed to get normal motion, that in itself would obstruct motion. You can't move a square block in a round hole, and more or less this is what you have here. Basically, this is what you see. It's the deformity of the lower end of the tibia and fibula, post traumatic arthritis of the ankle joint with the two screws, as I pointed out.

Q. Will you continue, now Doctor. [98] A. My diagnosis, as far as the ankle was concerned, was a mal united com-

Barenfeld-Direct

pound fracture of the distal right tibia and fibula with post traumatic arthritis of the ankle joint. That, basically, is what I found.

Q. Now, Doctor, assume, Doctor, that prior to December 20th, 1969, Mr. Garafola had a normal ankle and that on that day, December 20, 1969, at about—between 4:15 and 4:30 he was caused to fall from a height of about thirteen feet onto a container and onto a steel floor, landing on his legs, would that accident be a competent, producing cause of the injury which you found? A. Yes.

Q. Doctor, considering that Mr. Garafola has a limitation and restriction of motion of the ankle, from December 20, 1969 to November 19, 1973, a little over four years, have you an opinion, Doctor, whether that restriction and limitation of motion is permanent in nature? A. It definitely is.

Q. Doctor, assume further that since the date of this accident, December 20, 1969, up to November 19, 1973, when you examined Mr. Garafola, he had pain in that ankle, have you an opinion Doctor, as to whether that pain is permanent in nature? A. Yes, it is.

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[100] * * *

Q. Doctor, assume that Mr. Garafola fell a distance of thirteen feet onto a steel floor, without hitting his head, would that, Doctor, be a competent, producing cause of a disturbance in the cranial cavity? A. Yes, it certainly could.

Q. Would, Doctor, would that be a competent, producing cause of buzzing and loss of hearing? A. Yes.

Q. Now, Doctor, assuming that that loss of hearing and buzzing existed in Mr. Garafola from December 20, 1969, until November the 19th, 1973, when you examined him,

Barenfeld-Cross

have you an opinion as to whether the buzzing in his ears and the loss of hearing are permanent in nature? A. As I said, I think it's logical to assume that it is permanent.

Mr. Bushlow: Thank you, Doctor.

Cross Examination by Mr. O'Brien:

Q. I have only a few questions for you, Doctor. You were not the treating physician, were you, Doctor? A. No, I was not.

Q. You simply examined him at the request of Mr. Bushlow for the purpose of testifying at this trial; [101] is that correct? A. That's correct.

Q. Now, I believe you just testified that the fall that Mr. Garafola took could be a competent, producing cause of the ringing in the ears. You're aware—Are you aware he was a professional prize fighter for a period of twelve years? A. Yes.

Q. Did he testify here in court that he had been hit in the area of the face, head, and ears on numerous occasions? A. I wasn't aware of that. I assume he was.

Q. Could these blows, as a prize fighter, these blows to the face and head and ears, could that have caused this tinnitus or ringing in the ears you mentioned? A. That could produce tinnitus.

Q. It could? A. Yes.

Q. Mr. Garafola has a bilateral hearing loss, doesn't he, neurosensory bilateral hearing loss? A. Yes.

Q. Isn't this something common with aging, in its higher frequency, which I believe he has? A. That's correct.

[102] Q. You're aware Mr. Garafola is now almost sixty-eight years old? A. Yes.

Barenfeld-Cross

Q. So it wouldn't be unusual if this loss of hearing were due to his age alone, would it? A. It could be.

* * * * *

Q. Have you treated anybody over sixty-five years of age? A. Yes.

Q. You treated many people sixty-five and over? A. Yes, I have.

【103】 Q. Could you answer my last question based on your experience, then? I'm talking about people engaged in hard manual labor, sixty-five years and older. Has it been your experience they usually retire? A. Usually, I can tell you that I have men doing hard manual labor at seventy and over. To generalize—You're asking me—You want me to be specific about this patient? It's impossible. There's no way I could know he would be able to work at this age had this accident not occurred. I can tell you many retire, many do not.

Mr. Bushlow: Will you let the doctor finish his explanation.

Q. Go ahead.

Mr. Bushlow: Let the doctor finish.

The Witness: I'm finished.

Mr. O'Brien: He answered, really.

Mr. Bushlow: Thank you.

Q. If Mr. Garafola desired, could he be rehabilitated to do some sort of sedentary work?

Mr. Bushlow: If your Honor please, I object to this question. If there were not a proper foundation

Barenfeld-Cross

as to the man's education, the man's background—I have no idea what kind of sedentary work is meant here, meaning the doctor [104] is in no position to give any opinion, not knowing his educational background, speech background, what training he has had before. I don't think it's fair.

Mr. O'Brien: Let the doctor answer with those qualifications.

Q. Can you? Can you answer that question from those aspects? A. I would imagine there is some kind of sedentary work that almost anybody can do that might not require any travel back and forth by public transportation, might not require standing or excessive walking.

If he were to sit all day in his home and answer a telephone, anyone can do that.

Q. Doctor, Mr. Garafola has told us from the stand that he does and can use public transportation. A. I would imagine there are some forms of sedentary work he can do.

Q. A man of Mr. Garafola's age, would you suspect or expect to find some fairly generalized arthritis throughout his body? A. I would say in most people sixty-seven years of age, if you x-rayed all of them, in many of them you would find certain arthritic changes, but usually they are asymptomatic, [105] usually they don't produce symptoms.

Q. Arthritis is an aging process? A. Osteoarthritis is an aging process.

Q. At about the time you're twenty-five or so it starts in? A. That's a little young.

Q. It starts, just it begins; isn't that correct? A. Allegedly after the age of thirty, the tissues start to deteriorate.

Mr. O'Brien: Thank you, Doctor.

*Barenfeld-Cross**Cross Examination by Mr. Stanziale:*

Q. Doctor, you're familiar with the terminology, a tin ear? A. Tin ear?

Q. Tin ear. That's basically a shortening of the word tinnitus that you use for the ear that Mr. Garafola has; is that correct? A. I'm not sure. I assumed it usually referred to a cauliflow type of ear. I'm really, to be honest, not familiar that it refers to buzzing in the ear.

Q. Or the shortening of the word "tinnitus" to "tin ear" to use that medical terminology? A. I'm really not familiar with it in that context.

【106】 Q. Doctor, let me ask you this: the type of buzzing that Mr. Garafola described to you, in your medical opinion do you feel that would be a result of his twelve years professional boxing career? A. It's possible. Now, the point is when did it start? If it started following his accident and he did not have it before, then I would have to assume it was due to that injury. If he had it during his boxing career or shortly thereafter, I would say so. His boxing career ended, I would assume, at least thirty-five years ago. If he did not have any buzzing in his ear until this accident, I don't see how you could attribute it to his fighting career.

Q. Doctor, there is no testimony as to whether or not it was before or after, at this point. The question to you is, it could have been possibly as a result of a boxing career? A. I'm going by my history. The gentleman gave me a history, indicated that the buzzing in the ear started only after the accident.

Q. This is what Mr. Garafola told you? A. That's correct.

Q. He also told you that he had limitation of motion in his right elbow; is that correct? A. That's true.

Barenfeld-Cross

[107] Q. This was substantive as opposed to objective findings as far as his pain in that right elbow; isn't that correct? A. What he tells me is substantive, yes.

Q. You found limitation of motion in the right elbow, Doctor? A. I did.

Q. Now, you know that he was involved in an accident in 1968, where he sustained some injury to that right elbow. Are you familiar with that? A. I'm aware the elbow motion was restricted prior to this injury, yes.

Q. In fact, Doctor, I believe you testified on direct you felt this elbow limitation was a result of a prior injury, not related to this particular accident; is that correct? A. Yes.

Q. Also, Doctor, you also said the pain in the right shoulder was found in the hospital record, benign tumor existed; that also was the result of—not related to this particular accident? A. Yes.

Q. The only injury that we're concerned that you know of, Doctor, is No. 1, the injury to the leg, the tibia **[108]** and fibula; is that correct? A. You mean that I did—objective evidence?

Q. Objective evidence of this particular accident. A. Yes.

Q. Only subjective evidence is to the buzzing to the right ear; is that correct? A. That's correct.

Q. Just because Mr. Garafola told you that he had no buzzing prior thereto, so you say it was related to this particular accident; is that correct? A. That's correct.

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[137]

AFTERNOON SESSION

2:00 p.m.

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The Court: Call your next witness.

Mr. Bushlow: If your Honor please, at this time I wish to offer into evidence the Long Island College Hospital records of William Garafola, the plaintiff.

The Court: Any objection?

Mr. Stanziale: No objection.

Mr. O'Brien: No.

The Clerk: Received in evidence as Plaintiff's Exhibit No. 1.

(So marked)

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[166] * * *

Mr. Bushlow: If your Honor please, that is the plaintiff's fact witnesses. But I ask his Honor to take judicial notice of the safety and health regulations.

Mr. Stanziale: You are not going to read it now?

Mr. Bushlow: I want to read the pertinent parts to the jury now.

Mr. Stanziale: I object to that. [167] That's part of the charge of the case and the law of the case. This is not factual testimony as far as what took place.

The Court: I will allow it. I don't happen to have a copy.

Mr. Bushlow: I will give you this copy.

The Court: Unless there is a quarrel about whether it is a copy. I would gather it's appropriate to read it.

Mr. Bushlow: Thank you.

Scott-Cross

Mr. Stanziale: For clarification, are these the rules?

Mr. Bushlow: This is 33FR11135 to amend 29 CFR, Code of Federal Regulations, Part 1504, entitled "Safety and Health Regulations for Longshoring."

I am going to read, your Honor, Section 1504.2, called, "Ladders," Subdivision E:

"When necessary to obtain access to or from a stowed deckload or other cargo and no other safe means is available, ladders or steps of adequate strength and positively secured against shifting or slipping should [168] be furnished.

"Where portable straight ladders are used, they should be of sufficient length to extend at least thirty-six inches above the upper landing surface.

"Adequate steps formed by the cargo, itself, are acceptable when the nature of the cargo and the type of stowage permits."

Section 1504.32, Subdivision B:

"When an edge of a hatch section or of stowed cargo more than eight feet high is so exposed that it presents a danger of an employee falling, the edge should be guarded by a safety net of adequate strength to prevent injury to a falling employee or by other means, employing equal protection under the existing circumstances."

That is the plaintiff's case, your Honor.

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[177] * * *

Q. Mr. Keeler, I want to give you a hypothetical question based on the testimony that has been given in this court. I want you to assume certain facts as follows: Please

Keeler-Direct

assume that a cargo vessel is loading No. 2 lower hold in the Port of New York.

Also, assume that drums of cargo are stowed in the wings of that No. 2 hatch, lower hold, and the containers and empty pallets are stowed in the square of the lower hold; that a part of this stow consists of a row or tier of containers seven or eight feet high, stowed from one side of the hatch square to the other. A second height or tier of containers is stowed on top of the first tier in such a manner so that there is an eighteen to twenty inch ledge constituted by the top of the first tier of containers.

Further, assume that empty wooden pallets are stacked one on top of the other, vertically, in a space on top of the first tier of containers and reach approximately to the height or level of the top of the second tier of containers.

Assume that there is a space approximately seven feet wide beneath this stack of empty pallets which are resting on that first tier of containers and that the distance from [178] the top of this stack of pallets with the deck of the lower hold is twelve to fourteen feet.

Please also assume that various of the holdmen at one time were standing on this aft ledge of the first height of containers, the eighteen to twenty inch ledge. They were directed by their supervisor to come out of that position and proceed to another sectional level of the hatch.

Assume that the vessel's ladders were blocked.

Assume that two of the holdmen asked their hatch boss for a portable ladder to get from the ledge on the containers to the top of the pallet stack.

Assume that this request was denied by the hatch boss.

Assume that the men then used the vertical face of the stacks of empty pallets to try to climb off or up from

Keeler-Direct

the eighteen to twenty inch ledge to the top of the second tier of containers.

Assume that the plaintiff fell while climbing on a vertical face of the empty pallets and was injured.

Now, I ask you, do you have an opinion as to whether this is a safe and workmanlike stevedoring operation, to refuse the men the ladder and expect them to climb the vertical face of the pallets? Could you tell me what your opinion is? A. Yes, I have an opinion.

[179] Q. Please give it to us with an explanation. A. To expect longshoremen to use a vertical stack of pallets to climb another eight foot, after he was up eight feet in the air with a void in back of him, so that there is no way if he slipped or fell that there was anything to catch him except the deck of the vessel, that it was not a safe or proper procedure that was being performed.

* * * * *

[185] * * *

Q. Mr. Keeler, what kind of equipment is customarily kept in a stevedore's gear room on a pier? A. The stevedore's gear room is equipped with all what we call working gear, all of the working gear they have because when they come aboard, they are the experts. The ship has hired them just like the ship has hired its captain or its crew. It's hired the stevedore, the expert. It doesn't attempt to tell the stevedore when he should test **[186]** his gear, when the old gear should be thrown away, when gear should be oiled or lubricated. He leaves that to the expert. When the work progresses on the ship, the ship doesn't mean to intersperse itself between the stevedore and some men working for him as to supplying gear or anything else. So the stevedore has the working gear. The vessel has the

Keeler-Direct-Cross

lifting gear, which is the actual booms and winches, and that's all they supply.

Q. Can you tell us what is in this gear that goes on the pier? Can you specify some of the items there? A. Mechanical gear, all of your lifting trucks, tractors, trailers, all that. That's stevedore gear. Say your bridle gear, your pallet bridle, your case straps, your heavy straps, coffee slings, flour springs, lub oil, hook—all that lifting gear is stevedore gear.

When you talk about moving gear, you're talking about rollers, crowbars, upper lines, grease. That's all supplied by the stevedore.

When you're talking about protective equipment, that is safety shoes, gloves, hard hats, rain gear, rubber gloves for handling high energy contacts of electricity, breathing devices, carbon monoxide testers, blowers for the hatch, those are all stevedore gear. That's all operating gear.

* * * * *

[187] * * *

Q. Are ladders included in the stevedore's gear room?

A. Yes, portable ladders are included in the stevedore's gear.

* * * * *

[188] * * *

Q. Mr. Keeler, remember the hypothetical question that Mr. O'Brien put to you in which he said— A. Yes, I do.

Q. He said the hold and you said, "That's not a safe procedure." Would you say that condition as it existed, Mr. Keeler, was an unseaworthy condition? A. Well, unseaworthy is again a question of law.

[189] Mr. O'Brien: If he wants to use the word safe, I'll go along with that.

Bushlow-Summation

Q. What that—

Mr. Bushlow: I'll withdraw.

Q. Was that a safe condition? A. No, to climb the pallets was not a safe condition.

Q. Was the hold—

Mr. Stanziale: I didn't hear the answer.

The Court: Read the answer.

(Read back)

Mr. Stanziale: I thought the question was referring to how the stowage was in the hold.

Q. Mr. Keeler, was the fact the stowage in this hold left a seven by seven, approximately, space in the cargo stowage, was that a safe condition? A. Yes, that's an ordinary condition. If there was no cargo to put in the hold, and ships have varying amounts of space left, until new cargo arrives, and especially when you are working on the floor of a hold, you don't give that space up. That's the last space you give up, until you know that you have all your heavy stuff, all the stuff that requires stowage on a steel deck and not on other cargo.

[72b] * * *

However, once you are up here with an empty container here and you have 16 feet you can fall, the safety regulations, which I will read to you and the law says this must be followed and the Court will so instruct you:

"When an edge of a hatch section or stowed cargo more than 8 feet high is so exposed that it presents

Bushlow-Summatin

a danger of an employee falling the edge shall be guarded by a safety net of adequate strength to prevent injury to falling employees or by any other means providing equal protection under the circumstances."

No net and no other protection.

[73b] There was no other way for William Garafola to leave this hatch except this way, under the strict orders of his immediate boss and his refusal to give him a ladder.

* * * * *

[79b] of this accident until today, approximately four years later, Mr. Garafola has not been able to return to work.

Mr. Garafola has testified that he earned \$11,000.00 a year. There has been no contradictory evidence even though this man represents the employer. If this was not so there would have been employment records here.

Mr. Garafola has been out of work for four years. That is \$44,000.00 and \$16,000.00 for medical expenses—

Mr. Stanziale: I object, your Honor.

There is no testimony or any stipulation that defense counsel has that he has not been able to go back to work.

Mr. Bushlow: I never said that.

Mr. Stanziale: We concede that.

At the time of the injury he was 63 years of age and I will stipulate for three years.

Mr. Bushlow: There was no stipulation at all as to that and no contradictory evidence that he hasn't returned—

Bushlow Summation

【80b】 Mr. Stanziale: I never conceded he was not able to return to work—

Mr. Bushlow: There is no contradictory evidence he is able.

He has not been able.

Add \$16,000.00 to the \$44,000.00 and that is \$60,000 out of Mr. Garafola's pocket. That is easy to figure out. You multiply 11 by 4 and add the \$16,000.00, conceded medical expense and you get \$60,000.00.

Now, comes the part which is more difficult, and that is the pain and suffering.

Now, you have heard Mr. Garafola testify that for the first two or three years after this accident he was laying in the hospital on his back for three and a half months with skin grafts, slits down the back of his leg and ankle, fusions, pins, screws, put in his leg and then they put him in a wheel chair for about two months and then they said "You can go home" and he went to his daughter's house in a wheel chair. He was in a wheel chair for 6 or 7 months with crutches trying to get out and walk and he tried. He doesn't want to make himself a cripple. He tried **【81b】** and then he was on crutches and Doctor Silver said that when he came into the office—and so does Doctor Weiss say this almost two years later—he came in on crutches and he was only ambulatory with crutches.

Every day, every day for four years pain in that leg. Crutches. Hobbling around. Mental anguish. All this from an active man in good health. You can see how he has kept himself over the years. A man who tried to keep himself physically fit, now hobbling around.

Bushlow-Summation

What is this four years of pain and suffering worth? You must decide that. You must arrive at a reasonable, fair and adequate amount.

Now, we go into future pain and suffering.

We don't know how long anyone of us will live. That is in the hands of the Lord. However, there are certain tables and statistics set down through the years giving us some kind of guideline and his Honor will so charge that the tables and statistics approximate that a man of Mr. Garfola's age, 67, has another approximation of 10 years to live.

[82b] Now, that doesn't mean that he is going to live ten years. He may live two or he may live twenty. We don't know. But we have to have something to base some of our claims on and we use that so it can help you.

You have heard Mr. Garafola's testimony as to the pain in his leg, the crippling, the buzzing in his ears, the medication to go to sleep and taking that into consideration with the ten years Mr. Garafola has in the declining years of life, considering that he is to be shackled with the injury subjected upon him by these people 3,650 days, 90,000 hours of pain and suffering—I ask you to consider that.

It is bad enough we are all subject to ills that come about within us but I am sure the good Lord never intended a man finish out his life in the condition Mr. Garafola is in now. You will have to decide how much that is worth. I know it is difficult but unfortunately, that is your obligation. That is your job here. It is your sworn duty to decide.

What more can I say about this case? **[83b]** What more can I say about this case that you haven't heard and seen?

Bushlow-Summation

I grow emotional. I can yell and scream but I don't have to. That screams out loud enough (indicating plaintiff). I don't have to.

Mr. Garafola is suing for \$500,000.00. I don't know what the value of life is. I don't know the value of piece of mind, of being free from pain not brought about by yourself or brought about because of an illness you cannot help. I don't know. I only give you these guidelines and say to you, use your common sense, your everyday experience.

What about Mr. Garafola's future loss of earnings? You see the shape this man is in. You heard the testimony of the doctor. He said he was doing very heavy physical labor. Was there any contradictory testimony? He would have a loss of 55 or \$33,000.00 if he worked 5 or even 3 more years.

I say Mr. Garafola was not liable for any contributory negligence. He did what he was ordered to do and he couldn't refuse [84b] for fear of losing his job. Where can he go for a job when this is all he knows?

Mr. Garafola now leaves in your hands the rest of his life. He knows you will do what your conscience dictates and he sits there knowing full well he will be vindicated.

Again, let me thank you for your patience and kindness.

* * * * *

[94b] * * *

Now, I will give you some of the safety and health regulations for longshoring issued pursuant to the United States Secretary of Labor and some of these have been called to your attention by counsel.

Section 1504 point 2 is entitled Scope and Responsibility.

Colloquy

"(a) The responsibility for compliance with the regulations of this part as placed upon employers is defined in section 1504 point 3(c)."

Section 1504 point 3(c) reads as follows:

"The term employer means an employer, any of whose employees are employed in whole or part in longshoring operations or elated employment as defined herein within the [95b] federal maritime jurisdiction on the navigable waters of the United States.

"(d) The term employee means any longshoreman or other person ngaged in longshoring operations or related employment within the federal maritime jurisdiction on the navigable waters of the United States other than the masters, ship's officers, crews of the vessel or any person engaged by the master to load or unload under 18 net tons."

Section 1504 point 3(j) reads:

"The term longshoring operations means the loading, unloading, moving or handling of cargo, ship's store, gear either into, in or on or out of any vessel on the navigable waters of the United States."

Section 1504 point 25 entitled "Ladders" subdivision (e) reads:

"When necessary to obtain access to or from a stowed deck load or other cargo and no other safe means is available ladders or steps of adequate strength and positively secured against shifting or slipping shall be furnished.

Colloquy

"If portable straight ladders are used [96b] they shall extend at least 36 inches above the upper landing surface.

"Adequate steps formed by cargo is acceptable if the storage permits."

This does not apply to what is covered by 1504 point 24(f).

I think that covers the sections you called attention to.

Mr. O'Brien: Yes, sir.

Mr. Bushlow: There is one more, your Honor, on the safety net.

The Court: What is that?

Mr. Bushlow: The safety net, your Honor.

That is 1504 point 32 subdivision (b).

The Court: Suppose you mark it, counsel. There are so many subdivisions here.

(pause)

The Court: Section 1504 point 32 subdivision (b):

"When an edge of a hatch section or stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by [97b] a safety net of adequate strength to prevent injury to falling employees or by other means providing equal protection under the existing circumstances."

* * * * *

[117b] The Court: I want to get your view. I don't want to hurry you. If it is a matter—

Juror Number 1: We are approaching a decision.

The Court: All right then, gentlemen. You may

Verdict

withdraw or ladies and gentlemen, rather, you may withdraw.

(Jury excused at 5:30 p.m.)

(Jury entered jury box at 5:45 p.m.)

The Court: Members of the jury, I have your note and I quote it:

"The jury has reached a decision."

Have you filled in the special verdict form?

Juror Number 1: Yes, your Honor.

The Court: Suppose you let me have it.

(Document handed to Court)

The Court: The answer to 1(a), unseaworthiness is "Yes."

The answer to 1(b), negligence is "No."

"What is the total amount of damages?" The answer is "\$235,000.00."

"If you find that plaintiff is entitled to damages, did the defendant shipowner sustain [118b] its burden that plaintiff contributed to the accident?" The answer to that is "No."

Number 4, "In the action of the shipowner against the stevedore, do you find that the stevedore breached its warranty to the shipowner to perform its work in a reasonably safe and workmanlike manner?" and the answer to that is "Yes."

Any comments or application by any of the parties?

Mr. Stanziale: I'd like to make motions in the absence of the jury.

The Court: All right.

Renewal of Motion to Dismiss

If there is nothing else from the jury, we will discharge the jury from further service in this case and members of the jury, you have been very conscientious in the consideration of this case and you are discharged from further service in this case at this time.

The Clerk: Report to central jury room Monday morning.

Mr. Bushlow: On behalf of Mr. Garafola, I wish to thank you.

Mr. Stanziale: Thank you, jurors.

[119b] Mr. O'Brien: Thank you.

The Court: The special verdict presented by the jury is now made part of the Court record.

Mr. O'Brien: At this time the defendant and third party plaintiff renews all motions made during the trial and further moves for judgment, notwithstanding the verdict, or in the alternative, for a new trial and on the ground that the verdict is excessive.

The Court: Denied.

Mr. Stanziale: I join those motions, renew all my motions and all motions available to me under the Federal Rules of Civil Practice and Procedure.

Mr. Bushlow: There is no Civil Practice here.

Mr. Stanziale: Federal.

The Court: Denied.

Mr. O'Brien: Can I work out an arrangement with Mr. Stanziale as to the counsel fees? If we cannot stipulate we will have a hearing.

The Court: Oh, that's all right.

Special Verdict

71 C 658

WILLIAM GARAFOLA V. F.A. DETJEN V. PITSTON STEVEDORING

Special Verdict

1. Do you find that plaintiff has established his claim against the defendant shipowner?

(a) of unseaworthiness?	√Yes or No
(b) of negligence?	Yes or √No
(c) if either answer or both is Yes, what is the total amount of damages?	\$235,000

 2. (a) If you find that plaintiff is entitled to damages, did the defendant shipowner sustain its burden that plaintiff contributed to the accident?

	Yes or √No
--	------------

 (b) If the answer to 2(a) is Yes, what percentage of the fault is attributable to the plaintiff?

	%
--	---

 3. Deducting the percentage from the total amount of damages referred to in 1(c), what sum do you find plaintiff is entitled to recover from defendant shipowner?

	\$_____
--	---------
- THE FOLLOWING QUESTION IS TO BE ANSWERED ONLY IF YOU FIND PLAINTIFF IS ENTITLED TO A VERDICT AGAINST THE DEFENDANT SHIPOWNER.
4. In the action of the shipowner against the stevedore, do you find that the stevedore breached its warranty to the shipowner to perform its work in a reasonably safe and workmanlike manner?

	√Yes or No
--	------------

Judgment Appealed From
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
71 Civil 658

WILLIAM GARAFOLA,

Plaintiff,

—against—

F. A. DETJEN, "SAAR",

Defendant & Third Party Plaintiff,

—against—

PITTSTON STEVEDORING CORP.,

Third Party Defendant.

FINAL JUDGMENT

This action having come on for trial before Honorable Walter J. Bruchhausen and a jury, and the jury having rendered a verdict in favor of the plaintiff and against the Defendant and Third Party Plaintiff for the sum of \$235,000, and for the recovery for full indemnity by the Defendant and Third Party Plaintiff against the Third Party Defendant,

AND, a purported "judgment" dated December 7, 1973, having been entered on December 10, 1973 without any direction by the Court for the entry of the same pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, notwithstanding that this action has not yet been finally

Judgment Appealed From

determined by the fixing of the amount of the "costs and reasonable counsel fees" referred to in the said purported judgment,

AND the United States Court of Appeals for the Second Circuit having by order dated March 12, 1974 dismissed the appeal of the Third Party Defendant from the said purported judgment for lack of jurisdiction, on the ground that it is not of Civil Procedure, nor a final judgment within the meaning of 28 U.S.C. Sec. 1291, and the protective cross appeal therefrom being hereby withdrawn for the same reason,

AND the amount of attorneys' fees and disbursements of the Defendant and Third Party Plaintiff recovered by it against the Third Party Defendant having been stipulated in the sum of \$5,615.63,

Now, upon the said jury verdict and the annexed stipulation fixing the amount of attorneys' fees and disbursements, it is

ORDERED AND ADJUDGED as follows:

1. The purported final judgment dated December 7, 1973 and entered on December 10, 1973 be and is hereby superseded and vacated.
2. The plaintiff, William Garafola shall recover of and from Defendant and Third Party Plaintiff, F. A. Detjen, "SAAR" the sum of \$235,000 together with costs heretofore taxed in the sum of \$244.36, amounting in all to the sum of \$235,244.36.
3. Defendant and Third Party Plaintiff, F.A. Detjen, "SAAR" shall recover of and from the Third Party

Judgment Appealed From

Defendant Pittston Stevedoring Corporation the said sum of \$235,244.36, together with the sum of \$5,615.63, attorneys' fees and disbursements as stipulated, amounting to the total sum of \$240,859.99, with taxable costs.

4. The supersedeas bond of Liberty Mutual Insurance Company dated January 15, 1974 heretofore filed by Pittston shall remain in full force and effect and shall be applicable to this final judgment and shall secure both the plaintiff's recovery of the Defendant and Third Party Plaintiff against the Third Party Defendant up to the amount therein stated, in the event of any timely appeal from this final judgment by the Third Party Defendant and any cross appeal by the Defendant and Third Party Plaintiff.

Dated: Brooklyn, New York
December 13, 1974

WALTER BRUCHHAUSEN
U.S.D.J.

Notice of Appeal

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

71 Civil 658

PIK:CM 9964

WILLIAM GARAFOLA,

Plaintiff,

—against—

F. A. DETJEN, "SAAR",

Defendant & Third Party Plaintiff,

—against—

PITTSTON STEVEDORING CORP.,

Third Party Defendant.

SIRS :

PLEASE TAKE NOTICE that the Third-Party Defendant, PITTSTON STEVEDORING CORP., hereby appeals from the judgment of this Court dated December 13, 1974, in favor of the plaintiff and against the defendant in the amount of \$235,244.36, and in favor of the defendant and Third-Party Plaintiff against the Third-Party Defendant in the amount of \$240,859.99, and said Third-Party Defendant

Notice of Appeal

appeals from each and every part of said judgment, as well as the whole thereof.

Dated: New York, New York
January 9, 1975

JOSEPH ARTHUR COHEN
A Member of the Firm
of
ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Third-Party Defendant
Office and Post Office Address
801 Second Avenue
New York, New York 10017
(212) 889-0410

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

PAUL KLEIN, being duly sworn, deposes and
says:

That he is over eighteen years of age and is not a party
to the within action. That on the 4th day of April, 1975,
he served a true copy of the annexed

APPENDIX

on

IRVING BUSHLOW, ESQ.
Attorney for Plaintiff-Appellee
26 Court Street
Brooklyn, New York

KIRLIN, CAMPBELL & KEATING, ESQS.
Attorneys for Third-Party Plaintiff-Appellee-Appellant
120 Broadway
New York, New York

herein, by depositing a true copy of the aforesaid properly en-
closed in a securely sealed and postpaid wrapper in a Post Office
box under the exclusive care and custody of the Government of the
United States, at 801 Second Avenue, in the Borough of Manhattan,
City and State of New York, addressed to the aforesaid as above
stated, and that said address(es) was (were) the address(es)
designated by the said attorney(s) as the address(es) within the
State of New York, where papers in this action might be served.

Sworn to before me this 4th
day of April, 19 75.

Albert V. Testa
Notary Public

ALBERT V. TESTA
NOTARY PUBLIC, State of New York
No. 31-9308300 Qual. in N. Y. Co.
Commission Expires March 30, 1979